Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1518

THE TELEX CORPORATION AND
TELEX COMPUTER PRODUCTS, INC.,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS D. BARR
DAVID BOIES
PAUL M. DODYK
ROBERT F. MULLEN
One Chase Manhattan Plaza
New York, New York 10005

NICHOLAS DEB. KATZENBACH
Armonk, New York
Attorneys for Respondent International Business Machines Corporation

Of Counsel

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

TRUMAN B. RUCKER
RUCKER, TABOR, MCBRIDE & HOPKINS
P. O. Box 1439
Tulsa, Oklahoma 74101

ROBERT H. HARRY
DAVIS, GRAHAM & STUBBS
818 Seventeenth St.
Denver, Colorado 80202

LLOYD N. CUTLER
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

August 28, 1975

RETURN TO SN4

INDEX

PAGE

OPINIONS BELOW AND JURISDICTION 1

COUNTERSTATEMENT OF QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 5

1. *Proceedings Below* 5
2. *Computer Systems and Peripherals* 8
3. *The Parties* 9
   (a) *IBM* 9
   (b) *Telex* 10
4. *Suppliers of Computer Systems and Peripherals* 11
5. *IBM's Relative Share of Various Segments of the EDP Industry* 15
6. *The Relevant Market* 16
7. *The Conduct Involved* 18
   (a) *Telex's Antitrust Claims* 18
   (b) *IBM's Trade Secret Claims* 20

SUMMARY OF ARGUMENT 20

ARGUMENT 23

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT IBM'S INTRODUCTION OF THE 2319 DISK DRIVE, OPTIONAL ONE- AND TWO-YEAR LEASES AND THE FET MEMORY—ALL AT REASONABLE PROFIT MARGINS—DOES NOT CONSTITUTE WILLFUL ACQUISITION OR MAINTENANCE OF MONOPOLY POWER VIOLATIVE OF SECTION 2 OF THE SHERMAN ACT 23

PAGE

1. *The Nature of IBM's Practices* 23
   The 2319 Disk Drive 24
   The Fixed Term Plan 25
   The FET Memory 26
2. *The Court of Appeals' Decision* 30
3. *The Opinion Below Correctly Applies Past Precedent* 33
4. *The Petition Seeks to Fabricate Conflicts Which Do Not Exist* 37
5. *Petitioners' Claim of Attempted Monopolization is a Nonsequitur* 42

II. THE COURT OF APPEALS PROPERLY APPLIED THE SHERMAN ACT IN REJECTING THE NARROW AND ARTIFICIAL MARKETS URGED BY TELEX BECAUSE TELEX'S MARKETS EXCLUDED THE MOST SUBSTANTIAL PART OF THE COMPETITION FOR IBM'S PERIPHERAL EQUIPMENT 44

1. *Telex's Relevant Market Theory Improperly Excludes Companies and Products Competing with IBM* 45
2. *The Court of Appeals Applied Proper Legal Standards to the Specific Facts Found by the District Court and Correctly Concluded that the District Court's Relevant Market Definition Was Improperly Narrow* 49
3. *The Court of Appeals Corrected a Novel and Dangerous Misuse of the Sherman Act* 54

III. TELEX'S THEFT WAS UNLAWFUL 57

CONCLUSION 60

TABLE OF AUTHORITIES

CASES:

PAGE

American Tobacco Co. v. *United States,* 328 U. S. 781 (1946) 34, 53n
Greyhound Computer Corp. v. *IBM,* 1972 CCH Trade Cas. ¶ 74,205 (D. Ariz.) 8n, 56
Herald Co. v. *Seawell,* 472 F. 2d 1081 (10th Cir. 1972) 31n
Kewanee Oil Co. v. *Bicron Corp.,* 416 U. S. 470 (1974) 59
Northern Pacific Ry. v. *United States,* 356 U. S. 1 (1958) 55
Otter Tail Power Co. v. *United States,* 410 U. S. 366 (1973) 33, 34
Times-Picayune Pub. Co. v. *United States,* 345 U. S. 594 (1953) 31
Twin City Sports Service, Inc. v. *Charles O. Finley & Co., Inc.,* 1975 CCH Trade Cas. ¶ 60,195 (9th Cir.) 51n
United States v. *Aluminum Co. of Amcrica,* 44 F. Supp. 97 (S. D. N. Y. 1941), *aff'd in part and rev'd in part,* 148 F. 2d 416 (2d Cir. 1945) 35
United States v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945) 34, 35, 36, 37, 40, 41, 53n, 54
United States v. *E. I. du Pont de Nemours & Co.,* 118 F. Supp. 41 (D. Del. 1953), *aff'd,* 351 U. S. 377 (1956) 36, 37, 41
United States v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377 (1956) 44, 49, 52
United States v. *Grinnell Corp.,* 236 F. Supp. 244 (D. R. I. 1964), *aff'd,* 384 U. S. 563 (1966) 33, 53n

PAGE

United States v. *Grinnell Corp.*, 384 U. S. 563 (1966) 33, 41, 44, 49
United States v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954) 35, 36, 37, 41, 53n, 54
United States v. *United States Steel Corp.*, 251 U. S. 417 (1920) 54

STATUTES:

Judicial Code:

Section 1254(1), 28 U. S. C. § 1254(1) (1970) 1, 4

Section 1292(b), 28 U. S. C. § 1292(b) (1970) 8n

Sherman Act:

Section 2, 15 U. S. C. § 2 (1970) ..... passim

OTHER AUTHORITY:

Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) 19n

Posner, *Exclusionary Practices*, 41 U. Chi. L. Rev. 506 (1974) 19n

Spiegel, *Telex* v. *IBM*, 84 Y. L. J. 558 (1975) 19n

Turner, *Address to the Association of the Bar of the City of New York*, to be published in the Record of the Association of the Bar of the City of New York (Fall 1975) 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1518

THE TELEX CORPORATION AND
TELEX COMPUTER PRODUCTS, INC.,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners The Telex Corporation and Telex Computer Products, Inc. (Telex) seek a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. That Court, on January 24, 1975, directed the entry of judgment dismissing petitioners' claims that International Business Machines Corporation (IBM) had monopoly power with respect to certain segments of the electronic data processing (EDP) industry and that such power had been willfully acquired or maintained in violation of Section 2 of the Sherman Act. The Court also affirmed, as modified, a judgment for IBM on a counterclaim against Telex for misappropriation of trade secrets in the amount of $17,500,000 compensatory and $1,000,000 punitive damages.

OPINIONS BELOW AND JURISDICTION

The opinion of the court of appeals is reported at 510 F. 2d 894 and is Appendix C to the petition for writ of certiorari. The district court's opinion is reported at 367 F. Supp. 258 and is Appendix A to the petition for writ of certiorari. Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U. S. C. § 1254(1) as set forth at p. 2 of the petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The antitrust judgment of the court of appeals rests on two independent and sufficient grounds, each of which is based upon the facts as found by the district court:

First, that the IBM practices at issue, namely, the introduction of the 2319 disk drive, optional one- or two-year leases (the Fixed Term Plan) and monolithic Field Effect Transistor (FET) memory, did not constitute the willful acquisition or maintenance of monopoly power violative of Section 2 of the Sherman Act;

Second, that the district court erred in limiting its relevant market definition to include only those tape drives, disk drives and memories made and marketed by IBM as parts of its electronic data processing (EDP) systems and copies of such equipment marketed by Telex* and others and attached to IBM EDP systems, while excluding tape

*From 1970 forward a very large part of the Telex product line was obtained or planned to be obtained by Telex through a "massive and pervasive policy" by Telex top management to obtain IBM trade secrets unlawfully. (A 98, F 143)

There is a very substantial overlap between the equipment for which Telex sought antitrust damages and the equipment for which the district court awarded IBM $21.9 million in damages for theft by Telex of IBM trade secrets. Telex management's plan to steal led to both successes (the newest IBM tape drive in mid 1970) and failures (memories, terminals and printers). Telex's antitrust damage claim was almost entirely a projection of the future "profits" it would have earned on the trade secrets which it misappropriated from IBM. These overlapping projections of theft and antitrust damages led the district court into a quagmire in which it successively awarded Telex $350 million in treble damages, withdrew the award, found expressly that there was no evidence to support any antitrust damage award and finally awarded $259.5 million to a company whose total earnings from EDP products were less than $15 million over its entire life span and despite the award to IBM of $21.9 million for theft of its trade secrets relating to largely the same products.

drives, disk drives, memories and other computer peripheral equipment marketed by IBM, Telex and many other competitors for use with non-IBM systems, even though the record and the district court's findings showed all such equipment to be competitive and reasonably interchangeable.

Since the district court's error in defining the relevant market so narrowly completely vitiated its finding of monopoly power, the court of appeals had no occasion to pass on IBM's position that the district court's findings of fact established IBM's lack of monopoly power irrespective of the district court's market definition. The court of appeals likewise had no occasion to pass on IBM's position that the evidence below, as the district court at one point after trial expressly acknowledged,* provided no basis for *any* damage award to Telex, much less an award of $352,500,000 which the district court subsequently reduced by nearly $100,000,000 as its conclusional damage award began to unravel. The result reached by the court of appeals is accordingly sustainable on the further independent grounds, not reached below, that (i) IBM did not possess monopoly power irrespective of the market defined; and (ii) the record does not contain evidence upon which injury to Telex or the award of any damages can be sustained.

The holding of the court of appeals affirming judgment for IBM on its misappropriation counterclaim rests on the extensive findings below which in turn were based upon a largely uncontested factual record of testimony by Telex senior officers and documents written by them. The plan to steal formulated by Telex top officers and carried out by them over a three-year period was vividly displayed in that testimony and those documents. Hence, no serious factual defense was offered.

*See p. 6, *infra*.

The district court's findings extensively describe what it called the "massive and pervasive policy" of theft upon which Telex's business was based. (A 98, F 143)* The court of appeals' review of the evidence and findings led it to conclude that ". . . in view of what we deem to be rather flagrant conduct on the part of Telex, the trial court exhibited considerable restraint in its award of punitive damages". (A 264)

As set forth below at pp. 37-42, petitioners fail properly to set forth the questions decided by the court of appeals and subject to review by this Court pursuant to 28 U. S. C. § 1254(1). The antitrust decision of the court of appeals raises only two questions:

> (1) whether the court of appeals correctly held that IBM's introduction of (a) the 2319 disk drive; (b) optional one- and two-year leases; and (c) monolithic Field Effect Transistor (FET) memories—in each case at reasonable prices expected to result in profitability of at least 20%—did not constitute willful acquisition or maintenance of monopoly power violative of Section 2 of the Sherman Act;
>
> (2) whether the court of appeals correctly held that the district court erred in limiting its relevant market definition to include only those tape drives, disk drives and memories made and marketed by IBM as parts of its EDP systems and copies of such equipment marketed by Telex and others and attached to IBM EDP systems while excluding tape drives, disk drives, memories and other computer peripheral equipment mar-

*Citations to the district court opinion are to the appropriate page of the appendix to the petition for certiorari (*e.g.*, A 98). Where citation to the district court opinion is to a finding of fact or conclusion of law, that is also indicated (*e.g.*, A 98, F 143; A 131, C 6). Citations to the court of appeals' opinion are to the appropriate page of the appendix to the petition (*e.g.*, A 193) .

> keted by IBM, Telex and many other competitors for use with non-IBM systems even though the district court's findings clearly established that all such equipment was competitive and reasonably interchangeable with IBM equipment.

The result reached by the court of appeals with respect to Telex's antitrust claims is based on its resolution of these two questions, each of which constitutes an independent and sufficient ground for that result.*

The court of appeals' decision affirming the district court's judgment against Telex for theft of IBM trade secrets raises a third question:

> (3) Is a company whose innovations are misappropriated by competitors deprived of State law protection against theft because it allegedly has monopoly power?

STATEMENT OF THE CASE

1. Proceedings Below.

This action was commenced in January 1972. Telex initially alleged that IBM had monopolized the electronic data processing (EDP, or computer) market. It later added amendments charging that IBM monopolized "markets" alleged to consist of EDP equipment used with, and interconnected to, IBM EDP equipment, *i.e.*, equipment marketed by IBM and copies thereof. Based principally upon evidence obtained during discovery, IBM counterclaimed alleging that in copying IBM equipment Telex had stolen IBM trade secrets and copied copyrighted manuals related to the IBM equipment. The case was tried to

*As both courts below found that there was no evidence to support petitioners' claims that IBM possessed monopoly power in any market broader than petitioners' excessively narrow definitions, the court of appeals' decision with respect to the appropriate market, together with both courts' findings as to those broader markets, establish that IBM possessed no monopoly power.

the district court sitting without a jury in April and May 1973, and was initially decided in September 1973.

The district court's September 1973 decision, adopting Telex's amended theories of market definition and holding certain IBM conduct "predatory", awarded Telex $352,-500,000 in damages and entered injunctions. IBM was awarded $21,900,000 in damages for its trade secret claims, $13,776 in damages for its copyright claims, and injunctions were entered.

On October 8, 1973, after IBM moved against the damages and injunctive relief originally awarded and to amend certain findings,* the district court announced *"sua sponte"* that it had made "substantial error" in its antitrust damage award. (Order 10/8/73, R-CP 437)** After argument, the court concluded on October 16, 1973, that the record was "insufficient to justify the recalculation, or redetermination of the amount of antitrust damages by specific, or approximated sum". (10/16/73, R-CP 443) On October 17, 1973, Telex moved to amend that judgment, and, on October 19, 1973, without further taking of evidence, the district court again reversed itself and announced that it would make another damage award. (10/19/73, R-CP 449-450) Finally, on November 10, 1973, the district court reduced the judgment against IBM to $259,500,000.†

*Telex made no motions with respect to the judgment against it.

**Apart from the portions of the record included in the appendix to the petition, which are cited to as indicated *supra* at p. 4n., the record on appeal consists of two volumes of deposition transcript, which are hereinafter cited, *e.g.*, R-DT 12; five volumes of trial exhibits, cited, *e.g.*, R-E 207; three volumes of trial transcript, cited, *e.g.*, R-T 342; and one volume of court papers, cited, *e.g.*, R-CP 121.

†It, like the original award was wholly conclusional, and was described even by the district court as the kind of "general verdict" returned by a jury. (A 163-164) IBM vigorously contested the damage award in the court of appeals, because there was no way in which to calculate the sum awarded, because it was based on a projection of the future "profits" Telex hoped it would earn from use of trade secrets stolen from IBM, and because Telex had failed to prove that it had been injured by the conduct claimed to be unlawful.

At the same time the district court reduced the antitrust damage award, it amended (on motion by IBM) thirty of its antitrust findings of fact and substantially changed its injunctions. Nevertheless, the district court adhered to its legal conclusions on antitrust liability without modification.

IBM's appeal to the Tenth Circuit was based on the conflict between the district court's basic findings of fact, which IBM argued should control the result, and the district court's inconsistent legal conclusions concerning those facts. In contrast, Telex, both on appeal to the Tenth Circuit and in its petition for certiorari, has sought to argue its cause by repudiating the findings of the district court. In its petition for certiorari, Telex ignores the district court's findings against it and patches together a series of magazine articles, speeches and other nonrecord sources into a statement of "facts" which is, as demonstrated below, wholly inconsistent with the record and findings below.* In an extensive, carefully reasoned and unanimous opinion,** the court of appeals resolved the conflict between the district court's basic findings of fact and its inconsistent legal conclusions by applying settled principles of antitrust law to those findings of fact. The court of appeals reversed the district court's conclusion that IBM had violated Section 2 of the Sherman Act and ordered the antitrust complaint dismissed on January 24, 1975. It affirmed the holding that Telex was liable to IBM for theft of trade secrets, modified the compensatory damages award by reducing the judgment from $21,900,000 to

*See pp. 13-15, 27-30, *infra*, for discussion of the inconsistencies between the petition and the district court findings. Other examples of use by petitioners of nonrecord sources appear in petitioners' brief at pp. 6n, 7, 7n, 10, 13, 15, 16, 17n, 18, 19, and 26n.

**The court's opinion was styled per curiam and carried the statement: "Each member of the panel named above [Circuit Judges Seth, McWilliams and Doyle] collaborated fully in the preparation and writing of the within opinion." (A 265n)

$17,500,000, and affirmed the punitive damages award of $1,000,000.

On March 27, 1975, the panel of the court of appeals which decided the case denied Telex's petition for rehearing, and the Court of Appeals for the Tenth Circuit (Chief Judge Lewis not participating) denied Telex's suggestion for rehearing *en banc*. Telex filed its petition for writ of certiorari in this Court on June 2, 1975.* Remaining unresolved pursuant to the district court's severance and stay order under Rule 42(b) are Telex's claims that IBM has also monopolized foreign EDP markets by the same acts. Telex is currently seeking, by motion dated August 22, 1975, to amend and supplement the complaint and to activate discovery regarding these claims.**

2. Computer Systems and Peripherals.

A computer system consists of a group of electronically interconnected devices or "boxes" (called hardware) operating under the control of a set of electronic instructions written in prescribed logical forms and then stored in the system or put in for particular jobs (called software or programs). These boxes, separately or in combination with other boxes and software, perform the five basic functions

*In its petition for certiorari, Telex refers to a number of other private antitrust actions now in various stages of pre-trial preparation (Pet., p. 7, n. 7). All the cases cited were brought *after* the district court's decision in this case and *before* the decision of the court of appeals, and in several of those cases motions for summary judgment for plaintiffs, premised on a theory of collateral estoppel arising from the district court's decision, have been denied.

In addition to the *Telex* case, one other private antitrust action involving IBM and some of the same issues raised here, *Greyhound Computer Corp.* v. *IBM*, 1972 CCH Trade Cas. ¶ 74,205 (D. Ariz.) has gone to judgment. There the district court (Craig, D. J.) directed a verdict for IBM at the close of plaintiff's case, and the action is now pending on appeal in the Ninth Circuit.

**The district court entered an order pursuant to Rule 54(b) and made the findings required pursuant to 28 U.S.C. § 1292(b) permitting the parties' appeal. (A 191)

of a computer system in manipulating alphabetic or numeric data: input, output, processing, storage and control. The number and type of boxes interconnected to form a computer system varies widely depending upon the particular customer's EDP requirements. (A 15, F 25; A 16, F 27; A 16-17, F 28; A 24-25, F 40; A 72-73, F 110)

Although there is no common industry-wide nomenclature, one part of an EDP system, consisting of one or more boxes, is often referred to as a "central processing unit" (CPU) and generally includes the main processing unit, various control functions, the memory and some associated operator consoles. There are numerous other processor boxes which are called "channels" or "control units" and other hardware boxes in the system which are called "peripheral equipment". There is a tremendous variety of peripheral equipment furnished by a host of different suppliers. (A 17, F 29-30; A 25-26, F 42; A 26-27, F 43) On the average, peripheral equipment constitutes 50% to 75% of the price of a computer system. (A 22, F 38) Such equipment is "critical to the performance of the system as a whole". (*Id.*) Customers' choices among competing systems depend significantly upon the price/performance of competing peripherals. (A 22, F 38)

The difference between peripheral devices interconnected with one supplier's EDP equipment and those interconnected with that of another supplier—the means of interconnection is commonly referred to as the "interface"—is slight and the cost of developing the interface "has not constituted a substantial portion of the development cost of the peripheral device". (A 23, F 38)

3. The Parties.

(a) *IBM.* IBM has been "deeply involved in the phenomenal growth of the electronic data processing industry since almost the beginning". (A 8, F 10) Although not the first company in the industry—Sperry Rand's UNIVAC

I was the first commercially built computer—IBM was "recognized as an industry leader, having more revenue from the industry than any other company" and has been, and is, a highly successful company. (A 11, F 17; A 196)

In the industry's short existence, IBM has introduced more than 600 computer products and obtained "[b]y virtue of its own research and development" more than 10,000 patents which IBM has, as a matter of policy, "freely licensed". (A 75, F 112)

Both the district court and the court of appeals found that IBM had earned its success in the EDP industry through sustained effort which manifested a substantial degree of skill, foresight and industry. IBM's technology, organization and diligence have been of "high quality, contributing in a substantial degree to IBM's general success in the industry". IBM's products generally have "tended to set the standard for quality in the EDP industry". (A 38, F 59; A 74, F 112; A 250-251)

(b) *Telex.* Telex has been since 1940 a manufacturer of electronic equipment, including hi-fi's, tape recorders and hearing aids. It entered the computer business in 1959 by manufacturing a tape drive which it sold to a number of computer systems manufacturers for use with their equipment. (A 8, F 11) In 1966 it began to market those tape drives for use with IBM computer equipment. (A 8, F 12)

Although Telex has manufactured tape equipment, most "Telex" computer equipment has been manufactured by others, and remarketed under a "Telex" label. (A 9, F 13) Telex has leased entire computer systems on long-term discounted leases by adding its peripheral equipment to the remainder of the system, which it purchased from IBM and other EDP suppliers. (A 28, F 46) Telex had also allied itself with a Japanese computer manufacturer, Hitachi, to develop a central processing unit which was to

use software available without charge which was developed at great expense by IBM. (A 10, F 14)

In addition to marketing its peripherals for use with IBM computer equipment, Telex markets this same equipment for use with computer equipment made by some sixteen other suppliers of computer systems, including Burroughs Corp., Control Data Corp., Digital Equipment Corp., Sperry Rand Corp., The Singer Company, National Cash Register, Xerox Corp. and Hitachi. (R-E 2444-2451, 2540-2548, 2568-2572, 2581-2592)

In contrast to IBM, which develops, designs and manufactures all parts of its computer systems, Telex has had a "company policy generally of following IBM's product leadership and subordinating any technological product innovation". (A 10, F 15) In 1970 Telex's policy, fixed and implemented at the highest corporate level, shifted from merely copying previously delivered IBM products to theft of the design secrets of IBM equipment under development. (A 95, F 141; A 98, F 143)

From 1968 on, when its shipments of copies of IBM's equipment began in quantity, Telex's reported computer revenues showed a "phenomenal growth". (A 10, F 16) Based upon plans formulated by the highest corporate officers (the president and 3 vice presidents) in 1970 to steal design secrets for IBM's newest computer peripheral products (A 93-94, F 138), Telex speculated that it might achieve an even more accelerated growth rate. Both before and after the IBM practices here challenged, Telex saw itself "going to the moon". (R-T 868; R-E 2877-2879)

4. Suppliers of Computer Systems and Peripherals.

This antitrust and trade secret litigation arose out of the rapidly growing and changing EDP industry, which, since its inception in about 1952, as the courts below found, has consistently produced "[b]etter products and lower prices". (A 250; A 38, F 60) After reviewing the short history of

this new industry, the district court concluded: "The requirements of electronic data processing users, and the profusion of companies attempting to fill those needs, have led to a marked increase in the performance of products and significant decrease in the cost per unit of computing. Broadly defined, the EDP industry appears competitive and dynamic". (A 38-39, F 60)

The first commercially available EDP system, called the UNIVAC I, was designed and developed by predecessors of the Sperry Rand Corporation and was delivered to the United States Bureau of the Census in 1951. (A 11, F 17) One of the most advanced computer systems available when this action was tried in 1973 was the IBM System 370 Model 168. The progress of the EDP industry in providing ever improved performance during those twenty years can only be described as spectacular, as the following examples from the district court's findings demonstrate:

(1) The Model 168 central processing unit adds 4,300 times faster than the UNIVAC I, substracts 3,100 times faster, and divides 2,000 times faster, yet the price of the Model 168 is less than 7 times higher* than the UNIVAC I.

(2) The Model 168's memory capacity is 700 times greater than the UNIVAC I's.

(3) IBM tape drives used with the Model 168 (and other equipment) are 46 times faster and can hold 16 times more information than tape drives used with the UNIVAC I, but their price is only 1⅔ times higher.*

(4) IBM printers used with the Model 168 (and other equipment) provide 12 times the performance of early printers, but their price is less than 3 times higher.*

*Without downward adjustment to eliminate the effect of the inflationary pressures generally affecting the economy during that period.

(5) IBM disk files used with the Model 168 (and other equipment) provide 37 times the performance of early disk files, first introduced by IBM in 1956, but are 20% less expensive.* (A 38, F 60)

The number of competitors in the EDP industry has grown from 13 in 1952 to over 1,700 in 1970. (A 37, F 59) These competitors "include many large diversified companies with important skills and substantial financial resources, and many competitors are strong, independent and growing". (*Id.*) Entry into this market "has not proved difficult for many companies" (*id.*), and EDP revenue within the United States has multiplied 212 times from $48 million in 1952 to $10.2 billion in 1970. (A 37-38, F 59)

Both courts below found that the "almost kaleidoscopic" (A 3, F 1) "phenomenal growth" (A 8, F 10) of the EDP industry has been accompanied by a "profusion" (A 38, F 60) of companies entering into this "competitive and dynamic" business (A 39, F 60). As is demonstrated below, the district court's findings here, as elsewhere, systematically contradict Telex's fanciful rewriting—from nonrecord sources—of the history of the EDP industry and IBM practices:

(1) The number of companies which manufacture computer systems (including central processing units and peripherals) grew from 3 in 1952 to 96 in 1972—contrast Telex's repeated misstatements that IBM was "immune" from competition for central processing units. (A 196; A 38, F 59; Pet., pp. 3, 14, 15, 37)

(2) At the time of trial, there were more than 250 companies which manufactured peripheral equipment for use with EDP equipment manufactured by others. Of these, 100 supplied peripherals for use with IBM

*Without downward adjustment to eliminate the effect of the inflationary pressures generally affecting the economy during that period.

EDP equipment, up from 2 or 3 such suppliers in 1966 —contrast Telex's misstatement that there were only 12 companies which manufactured peripherals for use with IBM EDP equipment. (A 198; A 22, F 38 "Listing"; A 40, F 63; Pet., p. 9)

(3) The court also found: "Many companies, including Telex, which manufacture or market peripheral equipment for attachment to IBM CPU's also manufacture or market equipment for attachment to non-IBM CPU's, but to a substantially lesser extent"—contrast Telex's misstatement that Telex and other suppliers of peripheral equipment for attachment to IBM equipment do not supply peripheral equipment for attachment to non-IBM equipment. (A 23, F 38; A 223; Pet., p. 9)

(4) The district court found that suppliers of full systems, including IBM, Control Data Corp., Burroughs Corp., Digital Equipment Corp., and Honeywell Information Systems, provide peripheral devices for use with the systems of other manufacturers either directly to end users or to other system manufacturers—contrast Telex's bald assertion that suppliers of EDP systems do not supply peripheral equipment for use with EDP equipment supplied by other manufacturers. (A 22, F 38 "Listing"; A 27, F 45; Pet., p. 9)

(5) Moreover, as "[m]anufacturers of CPUs and peripherals use to a substantial degree the same technology", "[p]eripheral equipment manufacturers have expanded their peripheral product lines, moved into the leasing of complete EDP systems, and certain of those companies, including Telex, Memorex and Mohawk Data Sciences, are now expanding, or considering expanding, into the manufacture and marketing of their own central processing units". "Telex itself leases full systems to users, including IBM CPUs, and purchases

certain peripheral equipment from other manufacturers and remarkets it to end users." (A 27, F 45; A 13, F 20; A 28, F 46)

5. IBM's Relative Share of Various Segments of the EDP Industry.

Telex repeatedly claims that IBM "dominates" the EDP industry, has 65% of the central processing units installed and 61¾% of all peripherals used with all EDP systems. Indeed, Telex goes so far as to say that IBM was "immune" from competition in the marketing of its CPU's and because of this immunity could raise its CPU prices at will. *See, e.g.,* Pet., pp. 3, 7, 9, 14, 39, 45.

Whatever the legal consequence of such percentage shares (*infra,* pp. 52-54), they are in absolute conflict with the findings of the district court which were relied upon by the court of appeals and which were heretofore unchallenged by Telex. (A 196, 224)

The district court expressly found that there was no evidence which would justify Telex's claim that IBM had monopoly power in the "EDP industry as a whole or the general systems (CPU) market". (A 39, F 61) The district court found the EDP industry to be "competitive and dynamic". (A 39, F 60)

The district court found both that "[m]any companies, in addition to IBM, have shown spectacular growth, although none to the extent IBM has", and that, despite IBM's growth, its share of EDP revenue, as measured by a court-ordered census of EDP companies conducted during discovery and admitted into evidence without objection by either side, had declined from 64.1% in 1952 to 35.1% in 1970. (A 39, F 61) IBM also experienced comparably declining shares for electronic computers and peripheral equipment (IBM's share in 1971 was 36.7%) and peripheral equipment (IBM's share in 1971 was 30.4% of disks,

memory, other direct access storage units; 38.3% of printers and 45.6% of tapes).*

6. The Relevant Market.

Telex's theory of market definition was based on an attempt to persuade the courts below that IBM's alleged monopoly power should be assessed in an extremely narrow relevant market which included only disk drives, tape drives and memories made and marketed by IBM as part of its EDP systems and copies of such equipment marketed by Telex and others and attached to IBM EDP equipment, but which excluded tape drives, disk drives, memories and other computer peripheral equipment marketed by IBM, Telex and many other competitors for use with non-IBM EDP equipment. Telex further claimed that separate "'relevant submarkets'" existed for each type of device attached to IBM EDP equipment. (A 20, F 36)

Because the record, as summarized by the district court's findings, established that the EDP industry was "dynamic and competitive" and that IBM's shares of any meaningful segment of the EDP industry were modest and declining, adoption of Telex's narrow market theories was critical to its claims of monopolization. But these theories conflicted with the economic realities of the EDP industry. As the district court found:

> (1) peripheral products attached to non-IBM systems necessarily compete with and constrain IBM's power with respect to peripherals attached to IBM systems (A 22, F 38);

*These share statistics were derived by the lower courts from the most recently available data which existed at the time of trial. The 65% and 61¾% figures are used by Telex in its certiorari petition for the first time. They come from (i) an IBM document and (ii) some mathematical manipulation by Telex of the numbers in that document. The document was recited by the district court, but not relied upon by it in its findings as to either monopoly power or IBM's share in any relevant market. Both courts held that IBM's share of neither the EDP industry nor computer hardware (central processing units and peripherals) could support an inference of monopoly power. (A 196, 224; A 39, F 61)

> (2) peripheral products constitute an important part of a data processing system, accounting for 50-75% of the price of the system (A 22, F 38);
>
> (3) peripheral products are critical to the performance of EDP systems as a whole (A 22, F 38);
>
> (4) the "quality and price/performance of the peripherals attached to a system are a substantial factor in a customer's choice between competing systems" (A 22, F 38);
>
> (5) peripheral suppliers supply the same peripheral device, such as a tape drive or disk drive, for use with IBM and non-IBM systems (A 23, F 38 and "Listing");
>
> (6) the same suppliers supply peripheral equipment for use with IBM and non-IBM equipment (A 23, F 38);
>
> (7) the cost of developing an interface for a peripheral device is not substantial (A 23, F 38);
>
> (8) some EDP users completely perform their own systems integration work and combine peripherals and CPU's of various manufacture in configuring a system suited to their own particular needs (A 24, F 40);
>
> (9) suppliers of EDP systems, including Control Data Corp., Burroughs Corp., Digital Equipment Corp., Honeywell Information Systems and IBM, also supply peripherals for use with systems of other manufacturers (A 23, F 38 "Listing"; A 27, F 45);
>
> (10) manufacturers of central processing units and peripherals use substantially the same technology (A 27, F 45); and
>
> (11) suppliers of peripheral equipment are expanding into the manufacture of central processing units (A 13, F 20; A 27, F 45).

The court of appeals applied the legal criterion of reasonable interchangeability to the basic facts found by

the district court and concluded that the district court erred in its narrow market definition. Stressing the essential similarity of tape drives or disk drives or memories, no matter whose system they are used with, and the relatively low cost of interfacing these devices with EDP systems of different manufacture, the court of appeals rejected a relevant market defined in terms of IBM peripherals and copies thereof:

> "It seems clear that reasonable interchangeability is proven in the case at bar and hence the market should include not only peripheral products plug compatible with IBM CPU's, but all peripheral products, those compatible not only with IBM's CPU's but those compatible with non-IBM systems. This is wholly justifiable because the record shows that these products, although not fungible, are fully interchangeable and may be interchanged with minimal financial outlay, and so cross-elasticity exists within the meaning of the *DuPont* decision." (A 237)

7. The Conduct Involved.

(a) *Telex's Antitrust Claims.* At issue before the court of appeals were three specific acts by IBM: introduction of two kinds of EDP equipment, specifically the 2319 disk drives and the monolithic FET memory, and the adoption of optional one- and two-year leases at reduced rentals for certain equipment. Each of these practices is described in detail at pp. 23-30, *infra*.* Both courts below found that each of the practices was expected by IBM to result in "reasonable" profit margins of at least 20%. (A 74, F 111a; A 72-73, F 110; A 247-48) After exhaustive review of the

*At the time of trial and for years prior to that time, IBM offered all of its EDP equipment for sale or on rental agreements cancellable on 30-days' notice. (A 57; F 89a) At the time of trial, IBM also offered three longer term lease plans, two dealing with certain peripheral equipment and the other dealing with CPU's. (A 56, F 88)

district court's findings and the record, the court of appeals reversed the district court's legal conclusion that those practices were "predatory" and held that they were "ordinary marketing methods available to all in the market". (A 74, F 111a; A 250) Holding that the practices conconstituted competition on the merits through new product introductions and "reasonable" price reductions, which were available to all competitors and which did not reflect the use of monopoly power, the court of appeals concluded that "to prohibit such action [as the district court did] is to protect others in the market from ordinary competition". (A 253)

With respect to the district court's condemnatory characterization of IBM as "predatory", which was based on IBM's studies of its competitors, the court of appeals concluded that the "record demonstrates that these acts of IBM are again part of the competitive scene in this volatile business inhabited by aggressive, skillful businessmen seeking to market a product cheaper and better than that of their competitors. To do this, the record shows it was customary for them to study their competitors, all their capabilities, and what may be expected of them when a new product appears on the market". (A 74, F 111a; A 253-254) IBM's intent (and that of any competitor) is to compete with its competitors and, as the objective facts found by the district court conclusively demonstrate, IBM's practices constituted fair competition on the merits which resulted in better products at lower prices.*

*A contrary view would necessarily result in inhibiting the introduction of new and cheaper technology and depriving consumers of choices among various rental arrangements; that is, it would penalize the consumer for the benefit of competitors. See Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Posner, *Exclusionary Practices*, 41 U. Chi. L. Rev. 506 (1974); Spiegel, *Telex* v. *IBM*, 84 Y. L. J. 558 (1975), all criticizing the result reached by the district court.

(b) *IBM's Trade Secret Claims.* Telex has not defended its "massive and pervasive" (A 176, C 45) theft from IBM on any factual ground. Below it advanced defenses based on the statute of limitations, the claimed nonexistence of trade secrets as a matter of law and other technical grounds. In this Court it argues that the Sherman Act, if found to have been violated by IBM, gave Telex a license to steal. (Pet., pp. 48-49) As Telex thus concedes, it stole the very products to which it claimed injury in "its" business or property by reason of IBM's alleged monopolization* and for which the district court anomolously awarded antitrust damages on the theory that Telex might otherwise have sold more of what it had stolen at higher prices. The court of appeals concluded that, "in view of what we deem rather flagrant conduct on the part of Telex, the trial court exhibited considerable restraint in its award of [$1,000,000] punitive damages" and held that "our study of the record indicates that the trial court's findings of fact are amply supported by the record". (A 264, 256)

SUMMARY OF ARGUMENT

1. At issue in the court of appeals were three specific IBM practices: the introduction of the 2319 disk drive, optional one- and two-year leases (in addition to IBM's older thirty-day lease and outright purchase plans) and the new FET memory. Both courts below found that this equipment and these leases were offered at "reasonable" prices, including an anticipated profit of at least 20%.

*Is a person whose claim for damages is based upon profits which he expected to derive from products which he has stolen entitled to recovery as a ". . . person who shall be injured in his business . . ."? In light of the findings below the answer may well be in the negative. The district court found that "Beginning with the hiring of James [in March of 1970] and continuing at least until commencement of this lawsuit, Telex followed a practice of acquiring as an important part of its business IBM confidential information and trade secrets through the hiring of IBM employees with knowledge of such confidential information and trade secrets". (A 95, F 141)

2. The court of appeals correctly concluded that these practices did not constitute exclusionary or predatory conduct violative of Section 2 of the Sherman Act, but rather constituted competition on the merits of the kind which the Sherman Act was designed to encourage.

3. No Federal court has ever suggested, much less held, that the introduction of new products and optional one- and two-year leases constituted a violation of the Sherman Act. Petitioners' assertion that the result below is in conflict with *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945) is a pure fabrication. That case and all other precedents declaring conduct unlawful under Section 2 of the Sherman Act have involved egregiously exclusionary behavior and have expressly recognized that the Sherman Act was enacted to encourage, not suppress, competition on the merits, such as the introduction of new products and new options in terms of trade.

4. The district court limited its relevant market to include only disk drives, tape drives and memories made and marketed by IBM as parts of its EDP systems and copies of such equipment marketed by Telex and others and attached to IBM equipment, but excluded tape drives, disk drives, memories and other computer peripheral equipment marketed by IBM, Telex and many other competitors for use with non-IBM equipment. The district court so limited its relevant market, despite the fact that it found, *inter alia,* that it was relatively inexpensive to adapt peripheral equipment for use with computer equipment from different manufacturers; that IBM's peripherals competed with peripherals marketed by competing systems suppliers; that peripherals make up more than one half the price of a system and significantly influence the consumers' choices among competing systems; that the same peripheral suppliers supply peripherals for use with IBM systems and

non-IBM systems; that the same companies supply both systems and peripherals in competition with IBM; and that the same basic peripheral device is marketed for use with IBM and non-IBM systems. The court of appeals correctly concluded that these (and other) district court findings clearly established that the court's relevant market definition was too narrow and improperly excluded many companies and products competing with IBM.

5. In reaching this conclusion, the court of appeals applied the proper legal criterion, that of "reasonable interchangeability", to the facts found by the district court and correctly concluded that these facts proved that IBM was subject to a far broader range of competition than that embraced by the district court's relevant market definition. That decision is correct and is not in conflict with the decision of any other Federal court.

6. The court of appeals' decision corrected a novel and dangerous misuse of the Sherman Act. By combining condemnation of ordinary competition in the form of new products and optional short-term leases with an artificially narrow market definition framed in terms of the products of a single company and copies thereof, the district court opened the door to unjustified treble damage litigation which would suppress ordinary competition and flood the Federal courts with groundless claims of monopolization.

7. Both courts below correctly found that Telex had engaged in a "massive and pervasive policy" of theft of IBM trade secrets. Because Telex's "flagrant conduct" was incontrovertably displayed in trial testimony and documents, Telex does not contest the facts which prove that Telex came to base its business on theft of IBM trade secrets. There being no Federal defense to theft, the court of appeals' misappropriation decision presents no question for review by this Court.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY DECIDED THAT IBM'S INTRODUCTION OF THE 2319 DISK DRIVE, OPTIONAL ONE- AND TWO-YEAR LEASES AND THE FET MEMORY—ALL AT REASONABLE PROFIT MARGINS—DOES NOT CONSTITUTE WILLFUL ACQUISITION OR MAINTENANCE OF MONOPOLY POWER VIOLATIVE OF SECTION 2 OF THE SHERMAN ACT.

The court of appeals held that IBM did not violate Section 2 of the Sherman Act. Its holding is based on two independent and sufficient grounds. First, the court held that the IBM practices involved did not constitute willful acquisition or maintenance of monopoly power in violation of Section 2 of the Sherman Act. (A 253) Second, the Court reversed the district court's limitation of the relevant market to include only those tape drives, disk drives and memories made and marketed by IBM as parts of its EDP systems and copies of such equipment marketed by Telex and others and attached to IBM EDP systems while excluding tape drives, disk drives, memories and other computer peripheral equipment marketed by IBM, Telex and many other competitors for use with non-IBM systems. (A 237)

The decision below, in both its aspects, is clearly correct. Moreover, if either of its two basic rulings is valid, its antitrust judgment must stand. It is not in conflict with any decision of this Court or any court of appeals and raises no issue worthy of review by this Court.

1. The Nature of IBM's Practices.

The decision of the court of appeals relating to IBM's practices proceeds from the simple fact that the IBM con-

duct challenged consists of "ordinary competition". (A 253) Specifically, the practices involved consisted of offering EDP equipment and optional lease plans at "prices [which] were reasonable in that they yielded a reasonable profit". (A 250)

The 2319 disk drive. The earliest of the practices at issue was the introduction by IBM of the 2319A and 2319B disk drives in late 1970. A disk drive is a device which stores information or programs used in a computer system on magnetic "disks" or records. The 2319A disk drive was designed for use with IBM's System 370 Model 145 central processing unit announced concurrently with the 2319A. (A 200-201) It contained three disk spindles and certain control functions. The balance of the control function was performed by an integrated file adapter (IFA). Users had the option of securing comparable disk drive functions by obtaining 2314-type disk drives and a 2314-type stand-alone control unit. (A 49, F 75) The 2319B made the three-spindle 2319 configuration available to other IBM System 360 and 370 users. (A 202)

The 2319A and 2319B utilized portions of earlier 2313 disk drives and enabled IBM to reuse parts of those drives which had been returned by lessees and thereby to reduce the costs of manufacture. (A 49, F 75; A 50, F 78; A 202n) Use of the 2319 disk drive with the IFA avoided the necessity for a stand-alone 2314 unit and the additional power supplies, cooling equipment, frames and costs associated therewith.

The 2319 disk drives were offered by IBM at prices below those charged by IBM for earlier disk drives. The district court found that the profitability of the 2319 was expected to be at least 20% at the reduced prices, which both courts below found to be "reasonable". (A 74, F 111a; A 250) Telex and other competitors responded by reducing their prices on competitive disk drives. (A 203) Subsequent to IBM's 2319 announcements, Telex negotiated a 28% reduction in the price which it paid its supplier of competing disk drives and experienced a significant increase in its order rate after reducing its prices. (A 245)

The Fixed Term Plan. In May 1971 IBM introduced Fixed Term Plan leases with respect to certain peripheral equipment.* (A 60, F 94) Before May 1971, IBM had offered EDP equipment for sale and for lease cancellable on thirty days' notice. (A 206, A 237-238) Under the Fixed Term Plan, IBM added another option whereby users could choose instead to lease equipment for a one- or two-year term. (A 237-238, 264) The one-year lease was offered at an 8% discount from 30-day lease rates and was cancellable on payment of the lesser of two-and-one-half months rental or the amount remaining due. (A 60, F 94; A 204) The two-year lease was offered at a 16% discount from the 30-day lease rates and was cancellable on payment of five months' rental during the first year or the lesser of two-and-one-half months rental or the amount remaining due during the second year. (*Id.*) Purchase prices were correspondingly reduced, and charges for extra shift use of rental equipment were eliminated. (A 204)

Adoption of the Fixed Term Plan and its selection by many customers enabled IBM to reduce its costs by reducing expenses of removal, shipment, reinstallation and marketing. (A 64, F 100) Most of IBM's competitors had offered leases of similar and longer periods with comparable termination provisions (or no permitted termination at all) before IBM's adoption of the Fixed Term Plan.

---

*In March 1972, IBM introduced its Extended Term Plan which provided for a two-year term and rates 15% lower than the 30-day lease on additional peripheral equipment. In 1973 IBM introduced its Term Lease Plan which offered four-year terms at less cost for IBM central processing units. IBM also continued to offer its equipment on 30-day lease or for outright purchase.

(*Id.;* A 210, 240) No evidence was introduced to show that the termination charges exceeded the costs IBM would incur by reason of breach of the leases and both courts below characterized the lease terms as "reasonable", "unexceptional" and "commonplace". (A 56, F 88; A 153, C 29; A 210, 240)

IBM expected that adoption of the Fixed Term Plan would improve its profitability and anticipated that equipment leased under it would yield a "reasonable" profit in excess of 20%. (A 74, F 111a; A 250) IBM's competitors reduced their prices in response to IBM's Fixed Term Plan. (A 208) After an interim period following IBM's adoption of the Fixed Term Plan, the volume of installations of competing peripherals used with IBM equipment nevertheless "rose remarkably". (A 210)

The FET Memory. In 1972 IBM introduced the new System 370 Models 158 and 168 central processing units. IBM also introduced a new memory using monolithic or integrated circuit technology in place of the ferrite core technology which had been commonly used in the industry. The new memory, referred to as the FET (Field Effect Transistor) memory, is 30 to 50 times smaller, offers improved performance and costs far less to manufacture, as compared to older core memories. (A 246)

IBM expected the Models 158 and 168 central processing units and the FET memory to result in reasonable profit margins of at least 20%. (A 74, F 111a; A 250) Shortly after announcement of the FET memory, certain IBM competitors, including Telex, Ampex, Control Data, Itel and Intel, announced their intention to market memories in competition with IBM's new memory for use with the Models 158 and 168 central processing units. (A 71, F 108; A 246-247)

In sum, the IBM practices at issue before the Tenth Circuit consist simply of the introduction of computer

equipment, the 2319 disk drive and the FET memory, and the offering of optional one- and two-year leases—all at reasonable prices expected to result in profitability of at least 20%.

Telex, seeking to avoid the inescapable legal consequences of what IBM actually did, as found by both courts below, uses its petition as a polemic of misstatements about IBM's conduct and its consequences, based largely on unsupported assertions and nonrecord sources. Thus it is not only the decision of the court of appeals which is under attack but also the findings of the district court; for example:

(1) Telex claims that IBM "did not content itself with reducing its prices merely to meet those of competitors; it grossly undercut them (App. 151), with the obvious purpose and intent of forcing them out of business". (Pet., p. 13) However, the district court's finding 95a is flatly to the contrary:

> "Between 1968 and 1972, Telex had a number of products which competed with IBM products. There were many price changes and price variations during this period. All of those Telex products were at all points in time listed at lower prices than comparable IBM products except on four isolated occasions. Telex's prices were generally higher than the prices of other plug compatible manufacturers. In addition, Telex and the other plug-compatible manufacturers generally reduced below list the prices they actually charged through various forms of price concessions." (A 61, F 95a)

Thus, IBM's competitors' prices were not "grossly undercut".

(2) Telex claims that IBM's one- and two-year leases contained "punitive termination provisions" (Pet., p. 13), relying on a phrase taken out of context from the district court's conclusions and suppressing the description of those termination provisions by both courts below:

> "The trial court concluded (C29) that the leases were 'commonplace commercial agreements,' . . . and when the leases were announced, most of the competition had similar leases in effect. Thus, the customers had the choice of a lease, rental arrangement, or purchase.
>
> * * *
>
> ". . . These [termination] provisions applied uniformly and regardless of the reason for termination including the substitution of equipment. The leases offered by the competition of IBM also contained provisions for payment in the event the lessee terminated. Also, some did not provide for termination by the lessee. (F 100 and C 29)
>
> "The trial court made no finding, and no evidence was introduced, as to whether the termination charges represented actual damages IBM would incur upon such a lease termination or whether they were more or were less. Thus no evidence exists to show whether the charges were excessive or not." (A 240)

Telex's "punitive" characterization cannot substitute for proof Telex never offered.

(3) Telex claims that "[p]lans were devised of which an IBM analysis brutally stated that the end result, for any competitor, would be a 'dying company!'" (Pet., p. 11, n. 12, citing to R-E 960) In selectively cropping the con-

tents of this document, Telex fails to disclose that this statement referred to a hypothetical situation in which a company chose not to introduce new or "follow-on" computer products. Telex omits the material which immediately follows—a prediction of success for companies which market new, follow-on products (R-E 960):

> "Follow-on gets
>
> —more revenue & profit $ for company
> —MFG. ENG. funded
> —growing, profitable company"

Thus, the document predicts, not surprisingly, that a company which does not develop new equipment in a competitive and technologically progressive industry will not survive. IBM predictions made both before* and after** IBM's price reductions predicted that Telex (and similar companies) would introduce new equipment, as indeed such companies have done.†

(4) Telex claims that the "effect" of IBM's practices was to "drive out" competitors (Pet., p. 2), that competitors "cannot survive" (*id.* at 3), and colorfully, that they were "gun[ned] down" (*id.* at 37). However, the court of appeals, relying upon the district court's findings of fact, concluded that "After the initial [Telex] price reaction [to IBM's price reductions] with a significant loss of orders by Telex it within a relatively short time again recovered and began to increase its share of the market. The trial court so found (F89, F67, F116, F108)". (A 250) Other companies, while experiencing a "discernible diminution in the[ir] rate of increase", "continued to appreciably

---

**E.g.*, R-T 484, R-E 1338.

***E.g.*, R-E 290-292, 1653-1659.

†R-E 2766-2769; *see, also,* R-E 2488-90, 2597-99, 2628, 2630-2633.

advance". (A 78-79, F 116) No one was "driven out", none "cannot survive" and none was "gun[ned] down". Indeed, as both courts below found, the number of companies marketing peripheral equipment for use with IBM equipment had grown from two or three in 1966 to over 100 at the time of trial. (A 40, F 63; A 198)

2. The Court of Appeals' Decision.

Both courts below concluded that IBM did not possess monopoly power in the EDP industry as a whole or with respect to central processing units or general systems. (A 39, F 61; A 196) Rather, "the EDP industry appears competitive and dynamic". (A 39, F 60) Both courts recognized that IBM "tended to set the standard for quality in the EDP industry for products and services". (A 74, F 112; A 248, 251) The district court could find no evidence that the position IBM earned in the industry was due to any anti-competitive conduct. (A 75, F 112) Rather, both courts found IBM's success was due to a "praiseworthy degree" of "skill, foresight and industry". (A 74-75, F 112; A 248, 250) The only conduct issues before the Tenth Circuit were whether three specific acts, IBM's introduction of the 2319 disk drive, the Fixed Term Plan and the FET memory, constituted violations of Section 2.

The court of appeals concluded that the introduction of new equipment and alternative arrangements for leasing equipment constituted "ordinary business practices typical of those used in a competitive market". (A 249) The court stressed that each of the practices involved marketing equipment at reasonable rates of return:

> "The resulting prices were reasonable in that they yielded a reasonable profit. This 'profit' the trial court found to be about 20 per cent." (A 250)

There was no suggestion that any equipment was marketed at a loss.

The court went on to hold that there was no basis for a conclusion that IBM's conduct reflected the use of monopoly power. There was "no use of price reductions by an economic giant to drop prices to a level where it is not receiving an adequate return". (A 250) The "particular products of IBM here considered stood on their own feet as to financial returns". (A 251)

Relying on *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594 (1953), the court of appeals held that the objective nature of the practices at issue was inconsistent with the district court's "predatory" characterization of IBM's conduct.* (A 253) That characterization was based not on what IBM did, but on the district court's view of IBM's intent. (A 248, 253-254) The district court concluded that IBM introduced the 2319, the Fixed Term Plan and the FET memory in order to slow the replacement by competitors of IBM peripheral equipment on rent and that IBM expected its new offerings and reduced prices to improve its competitiveness and profitability and concomitantly to reduce its competitors' rates of growth in sales and revenues. (A 74, F 111a; A 60, F 93; A 71, F 108) It was apparently because of IBM's expectation that these actions would improve its competitive position vis-a-vis its competitors, that the district court concluded IBM's conduct violated Section 2 of the Sherman Act.

The court of appeals pointed out that the lower court's analysis of the nature of IBM's intent was flawed in sev-

---

*The district court's harsh characterization of IBM's acts as "predatory" was not unlike other such characterizations by the same court, which have also been reversed as conclusions inconsistent with the basic findings of fact concerning the conduct involved. *Herald Co.* v. *Seawell,* 472 F. 2d 1081, 1096 (10th Cir. 1972).

eral material respects.* However, the appellate court went beyond those flaws and held that the nature of IBM's conduct was inconsistent with the lower court's conclusion that IBM's conduct constituted a violation of Section 2 of the Sherman Act. Rather, the court decided that the introduction of new equipment and the reduction of prices is the very essence of competition on the merits which the Sherman Act was intended to encourage and that to proscribe such conduct "is to protect the others in the market from ordinary competition". (A 253)

The court of appeals correctly held that the record showed only active competition among many firms "seeking to market a product cheaper and better than that of competitors". (A 254) The district court found that IBM was engaged in competition with at least 100 companies supplying peripheral equipment for use with IBM equipment—up from 2 or 3 in 1966. (A 40, F 63) These competitors reacted to each of IBM's challenged actions with further price reductions and product announcements. The end result is that IBM "and others in the market produced more advanced products better suited to the needs of the customers at lower prices" (A 251)—precisely the competitive performance which the Sherman Act was designed to encourage!

---

*The court of appeals stated that it had "some doubts as to whether the findings of the court [with respect to IBM's intent in introducing the 2319] are established". (A 200n) It further concluded that the "evidence was ambivalent as to the reasons which motivated the Management Review Committee's review of the Fixed Term Plan". (A 207) And it held that the district court's view of IBM's intent in introducing the FET memory was based on that court's erroneous assumption concerning IBM's view of how much competitors could profitably charge for memory used with the Models 158 and 168. (A 246)

3. The Opinion Below Correctly Applies Past Precedent.

The decision below is not in conflict with the decision of any other court. The court below held only that the introduction of new equipment and alternative short-term lease plans at lower rental rates—all at reasonable margins of profit—does not constitute a violation of Section 2. No court—other than the district court below—has even suggested, much less held, that a contrary result should obtain under the antitrust laws.

The decisions of this Court and the courts of appeals have consistently held that to prove a Section 2 violation, plaintiff must prove (1) that defendant has the power to control price and exclude competition and (2) that such power was acquired or maintained by conduct constituting the willful acquisition or maintenance of monopoly power. *E.g., United States* v. *Grinnell Corp.*, 384 U. S. 563, 570-71 (1966).

Thus, in each of the cases relied upon by petitioners as setting forth the law applicable to allegations of unilateral monopolization, there had been ample evidence of egregious anticompetitive conduct, as distinguished from competition on the merits. In *Grinnell,* that conduct included widespread and deliberate pricing below cost, the dismantling of competing firms, agreements among competitors to divide markets and fix prices and a steady stream of acquisitions of competitive enterprises. So egregious was the conduct involved that the district court stated:

> "[T]he companies he controlled had in the most flagrant way violated the clearest aspects, the so-called *per se* rules, of the Sherman Act and were continuing to follow patterns conceived in crime." (236 F. Supp. 244, 259 (D. R. I. 1964))

In *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973), the defendant had, among other things, refused to "wheel" power from competing suppliers and utilized restrictive provisions in its agreements with such suppliers

in order to stop consumers from acquiring power from such suppliers and instituted litigation designed to prevent, delay and harass the establishment of competitive systems. In *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946), the defendants had conspired over a period of years to set the price and terms for the acquisition of tobacco, to deprive competitors of tobacco, to sell their products below cost and to coerce retail distributors to adopt policies impairing the ability of competitors to merchandise their cigarettes.

United States v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945), cannot be read, as petitioners do, to preclude competition on the merits. The problem in *Alcoa* was the absence of any meaningful competition or new entry for 25 years. That result had come about because the defendant had " 'utilized its size for 'abuse' as can easily be shown" by "unlawful practices", such as the setting of prices by defendant for aluminum ingot and fabricated products (which its competitors made with ingot purchased from Alcoa) in relation to one another at a level below the cost of fabrication. (*Id.* at 430) In the *American Tobacco* case this Court described Alcoa's practices as "use of various unlawful means to establish or maintain the monopoly".*

A crucial difference between *Alcoa* and the present case lies in the widely disparate characteristics of the aluminum and EDP industries. Petitioners evidently agree (Pet., p. 33) that the relevant characteristics are those described in Judge Hand's famous passage stating the social and economic case against monopoly:

*"The present cases are not comparable to cases where the parties, for example, merely have made a new discovery or an original entry into a new field and unexpectedly or unavoidably have found themselves enjoying a monopoly coupled with power and intent to maintain it. *In the Aluminum Co. case, discussed later, there was a use of various unlawful means to establish or maintain the monopoly.* Here we have the additional element of a combination or conspiracy to acquire or maintain the power to exclude competitors that is charged in the fourth count." 328 U. S. at 786. (Emphasis added.)

> "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them." (148 F. 2d at 427)

The aluminum industry at the inception of the *Alcoa* litigation was marked by all the characteristics Judge Hand associated with monopoly, while the EDP industry has been marked by all the characteristics Judge Hand associated with competition. Alcoa was, and had been for several decades, the sole domestic producer of aluminum. There had been no new entry despite modest growth in the size of the industry. Nor had there been any significant improvements in the aluminum manufacturing process. (148 F. 2d at 423, 430; 44 F. Supp. 97, 148-149 (S. D. N. Y. 1941)) The EDP industry, on the other hand, has been characterized by explosive growth in the overall size of the industry (from $48 million to $10.2 billion) and in the number of new entrants (from 13 in 1952 to over 1700 in 1970). Product improvements have been revolutionary in nature with computers passing through four distinct technological generations in twenty years, increasing in performance by 1200% to 430,000% depending on the function involved and achieving "unparalleled" reductions in the cost of computing. See pp. 11-14, *supra;* R-CP 47. Thus, the indicia of monopoly power identified by Judge Hand are clearly absent in the EDP industry.

And in *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347

U. S. 521 (1954), the court's holding was based largely on a finding that United's exclusive adherence to a mandatory 10-year lease-only policy coupled with cancellation charges which increased if competitive equipment was used and selective enforcement of lease provisions to deter acquisition of competitive equipment raised "unnatural barriers" which "unnecessarily exclude actual and potential competition". (*Id.* at 344-345)

None of those cases condemned product introduction, such as the 2319 or the FET memory. None of those cases condemned the offering of optional one- and two-year leases, responsive to customer demand and competitive pressure, as an alternative to sale and thirty-day lease plans.* None of those cases condemned the offering of products at reduced prices expected to yield reasonable profit margins of at least 20%.

Indeed, relevant precedent has consistently recognized the fact that the Sherman Act was enacted to promote the process of competition. Thus, the *Alcoa* case did not, as petitioners argue, hold that Section 2 is violated by the mere existence of monopoly power,** irrespective of the practices involved. To the contrary, in *Alcoa,* the court expressly recognized:

> "[T]he Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins." (148 F. 2d at 430)

In *du Pont,* the district court held:

> "The purpose of Congress in passing the Sherman Act was to preserve our system of free trade and

*Indeed, the district court in *United Shoe* permitted a five-year lease term, after concluding that United Shoe had monopolized the shoe machinery industry. (110 F. Supp. at 349)

**See Pet., p. 28.

> competitive economy. . . . [T]he right to normal growth and to enjoy the results of technical achievement and successful competition has been preserved. . . .
>
> "The decisions . . . demonstrate, if the challenged position is acquired, as it has been in this case, by superior technical skill and effective competitive activity, the resulting power from that position does not establish monopolization within the meaning of the statute." (*United States* v. *E. I. du Pont de Nemours & Co.,* 118 F. Supp. 41, 50, 215 (D. Del. 1953), *aff'd,* 351 U. S. 377 (1956))

And in *United Shoe,* the district court recognized that the Sherman Act must be applied to protect

> "the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster . . . [and to advance the purpose of] encouraging competition based on pure merit." (110 F. Supp. at 344-345)

In concluding that IBM's introduction of the 2319, the Fixed Term Lease Plan and the FET memory constituted competition on the merits of the kind which the Sherman Act was designed to encourage, the Tenth Circuit correctly applied the consistent teaching of past precedent. Its decision, through which consumers benefit, correctly encourages competition on the merits and raises no issue worthy of review by this Court.

4. The Petition Seeks to Fabricate Conflicts Which Do Not Exist.

In seeking to fabricate a conflict where none exists, petitioners assert "facts" not in the record, formulate issues

not involved in the disposition of this case, misstate the teaching of applicable precedent and totally avoid responding to the holding of the court of appeals concerning the specific acts at issue in this case.

Petitioners frame their first "question": "Is not the possessor of monopoly power subject to the same restrictions on conduct to maintain that power whether it was attained unlawfully or by growth? Did not the Court of Appeals err in holding otherwise?" (Pet., p. 2, Question I(a)) The short answer is that the Tenth Circuit did not so hold and the "question" stated by petitioners is not raised by the decision below. The court of appeals held that IBM's introduction of the 2319, the Fixed Term Plan and the FET memory at reasonable prices and profits did not constitute the willful acquisition or maintenance of monopoly power violative of Section 2. That holding is based on an evaluation of the objective nature of those specific practices—the only practices it was called upon to review. The specific practices at issue—the introduction of new equipment and optional short-term lease plans at reasonable prices—constitute lawful competitive activity. Reasons for IBM's success—its technological leadership and innovation and high quality of service—led the court of appeals to conclude that "IBM gained its market position by technical advances and quality products". (A 251) However, even if that had not been the case, the court of appeals' decision with respect to the practices in issue is independent of that conclusion and would remain valid.

Petitioners' second "question": "Is it not the very essence of the offense denounced by Section 2 that the possession of monopoly power imposes limitations not applicable to one not having such power?" is likewise not posed by the holding below. (Pet., p. 3, Question I(b)) The court of appeals did not declare any abstract rule that a firm possessing monopoly power can do anything which is not forbidden to businesses in general. What it held is that the

specific practices engaged in by IBM—the introduction of the 2319, the Fixed Term Plan and the FET memory—at issue before it did not constitute the willful acquisition or maintenance of monopoly power, but did constitute legitimate competition on the merits which the Sherman Act was intended to encourage.

The balance of petitioners' "questions" and reasons for certiorari relating to IBM's practices are an attempt to fabricate conflict by misstating either the district court's findings or applicable precedent. In its Question II, petitioners baldly assert that IBM's conduct involved the exercise of monopoly power in raising prices with respect to its CPU's, where it was "immune from any competitive reaction", in order to subsidize price reductions on its peripheral equipment. (Pet., p. 3) The fact, however, is that both courts below found no evidence to support Telex's claim that IBM possessed monopoly power with respect to CPU's. Indeed, the district court expressly found that: (1) the EDP industry is "competitive and dynamic"; (2) "IBM's market share of the EDP industry as a whole or the general systems (CPU) market does not of itself justify an inference of monopoly power"; (3) IBM's share of "electronic computers and peripheral equipment . . . was 36.7%"; and (4) "the number of companies which manufactured systems increased from 3 in 1952 to 96 in 1972". (A 39, F 60; A 39, F 61; A 39, F 62; A 38, F 59)

And the court of appeals, consistent with the district court findings, concluded that IBM's peripheral products "stood on their own feet as to financial returns"; that "IBM did not use monopoly power even if it is assumed that it possessed such power"; and that there was "no use of price reductions by an economic giant to drop prices to a level" where subsidization was required. (A 250-251) In short, Telex did not prove, and neither court below concluded, that IBM was "immune" from competitive reaction with respect

to CPU's or that IBM's peripheral prices were in any sense subsidized.

Petitioners variously argue that a case of monopolization may be proved by (1) proving simply that defendant has, as a "condition or state of affairs", monopoly power; or (2) proving that defendant has monopoly power and that such power did not descend upon defendant "without having been contributed to in any way by the monopolist's own affirmative acts"; or (3) proving that defendant has monopoly power and proving something unspecified about defendant's "intent" or "purpose". (Pet., p. 3)

Each of petitioners' misstatements of applicable principle is designed to obscure the fact that Federal courts have consistently held that proof of monopolization requires proof of monopoly power *and* some form of exclusionary conduct. It is designed to obscure the fact that the central purpose of the Sherman Act is to encourage the process of competition on the merits.

Petitioners assert that the *Alcoa* decision renders all competitive conduct by a firm possessing monopoly power violative of Section 2 except where the conduct leading to the acquisition of monopoly power is involuntary. Only where a competitor finds success "thrust upon it" without taking any "affirmative act" contributing to that success, does competitive success not violate Federal law. In any case where success is due to "affirmative acts" or where a competitor intends to succeed, Federal law is violated by success, irrespective of the nature of the conduct which resulted in success.

Judge Hand did not embrace a standard of legality which, to put it bluntly, would be meaningless nonsense. As the court of appeals observed:

> ". . . However, we do not accept the requirement that the only permitted exceptions, or that the 'thrust upon' shorthand description means that the events or acts must be entirely involuntary. To do so would

> permit the defendant corporation to do nothing whatever by way of change in marketing. There must be some room to move for a defendant who sees his market share acquired by research and technical innovations being eroded by those who market copies of its products. It would seem that technical attainments were not intended to be inhibited or penalized by a construction of section 2 of the Sherman Act to prohibit the adoption of legal and ordinary marketing methods already used by others in the market. . . ." (A 253)

No enterprise achieves competitive success by "involuntary conduct". No enterprise achieves competitive success without intending to win business. A rule which declares success through competition illegal except where the conduct involved is "involuntary" can never discriminate between that legitimate competition which is encouraged by the Sherman Act and the exclusionary conduct which is proscribed by it. Such a rule would simply inhibit all competition by successful firms and thereby seriously injure competition and the consumer. Adoption of petitioners' novel rule of involuntariness would lead to hopeless conflict in the lower courts and flood them with litigation by firms which had not prospered, attacking ordinary competitive practices of the kind here involved.

That rule has never been and should not be the law. The opinions in *Grinnell, Alcoa, du Pont* and *United Shoe* all expressly recognize that the Sherman Act was designed to encourage competition through new product offerings, new transactional alternatives and lower prices. *See Grinnell, supra,* 384 U. S. at 570-71; *Alcoa, supra,* 148 F. 2d at 430; *du Pont, supra,* 118 F. Supp. at 215; *United Shoe, supra,* 110 F. Supp. at 344-45. "The successful competitor, having been urged to compete, must not be turned upon when he wins." (*Alcoa,* 148 F. 2d at 430)

Petitioners seek to ignore that authority and to avoid confronting the actual holding below because the holding faithfully applies that authority and correctly concludes that IBM's introduction of the 2319 disk drive, the Fixed Term Plan and the FET memory constitute competition on the merits as distinguished from the willful acquisition or maintenance of monopoly power violative of Section 2 of the Sherman Act.

5. Petitioners' Claim of Attempted Monopolization is a Nonsequitur.

Petitioners' argument with respect to attempted monopolization can only be described as a nonsequitur. To the extent it can be understood, it appears to run as follows. In finding that it is relatively easy and inexpensive to interface peripheral devices for use with computer equipment of various manufacture, the courts below also necessarily found (although they did not appreciate the fact) that there existed a dangerous probability of IBM's monopolization of a broader asserted "market" including all peripherals. In finding that IBM intended to improve its competitive position vis-a-vis competing suppliers of peripheral equipment, the district court necessarily found that IBM had something called "specific intent". Because the offense of attempted monopolization allegedly consists of proof of specific intent to monopolize plus a dangerous probability of success, the courts below have necessarily, although unconsciously, held IBM guilty of attempted monopolization. (See Pet., pp. 39-43)

There is simply no logical basis for the statement that findings of ease of interface lead to the conclusion that there was a dangerous probability of success in monopolizing a peripherals "market". That conclusion is directly contradicted by the lower courts' findings that : (1) the EDP

industry is "competitive and dynamic"; (2) IBM's share of the "general systems (CPU) market" does not justify an inference of monopoly power; and (3) IBM's share of electronic computers and peripheral equipment was 36.7%, IBM's share of disks, memory and other direct access storage devices was 36.4% and its share of tape storage devices was 45.6%. (A 39, F 60; A 39, F 61)

The fact is that petitioners did not, and could not, prove that IBM had monopoly power in any meaningful part of the EDP industry or the dangerous probability of securing such power. And that fact is in no way undermined by the courts' findings with respect to ease of interface. Indeed, petitioners' argument has it exactly backwards. The true significance of the courts' findings concerning ease of interface is that competing producers of peripherals not currently used with IBM systems could readily adapt and market them for such use and therefore such firms directly exert competitive pressure on IBM's pricing of peripheral products and make impossible the control of price or exclusion of competition.

Petitioners' argument with respect to specific intent apparently proceeds from the assumption that a party engaging in ordinary competitive activity may be found liable for attempted monopolization on proof of "specific intent", even though such activity could not support a charge of monopolization. In other words, although legitimate competition cannot be the basis of a finding of monopolization where it leads to competitive success, it can nonetheless support a finding of attempted monopolization where it proves ineffective. That is transparent nonsense. When the court of appeals correctly decided that IBM's introduction of the 2319 disk drive, the optional Fixed Term Plan leases and the FET memory was legitimate competition and not conduct upon which a finding of monopolization could be based, it necessarily decided that such conduct could not constitute attempted monopolization. The court of appeals,

therefore, properly declined to consider the two issues "separately". (A 254)

As Donald F. Turner, Professor of Law and formerly Assistant Attorney General in charge of the Antitrust Division said in his recent lecture before the Association of the Bar of the City of New York:

> "Conduct which is not unlawfully exclusionary for purposes of 'monopolizing' cannot be made the basis of an attempt charge. Conduct lawful for a substantial monopolist, whether because it is competition on the merits or because of insignificant anti-competitive effects, is lawful for any firm insofar as § 2 is concerned."*

II

THE COURT OF APPEALS PROPERLY APPLIED THE SHERMAN ACT IN REJECTING THE NARROW AND ARTIFICIAL MARKETS URGED BY TELEX BECAUSE TELEX'S MARKETS EXCLUDED THE MOST SUBSTANTIAL PART OF THE COMPETITION FOR IBM'S PERIPHERAL EQUIPMENT

Monopoly power is the " 'power to control prices or exclude competition' ". *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571 (1966), quoting from *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956). As this Court held in *du Pont:* "It is inconceivable that price could be controlled without power over competition or vice versa". (*Id.* at 392)

In analyzing a charge of monopolization it is necessary to define a relevant market in which to assess what constraints, if any, competition places on the ability of the

*To be published this fall in The Record of the Association of the Bar of the City of New York.

alleged monopolist to raise prices while excluding competition. Since the purpose of market definition in a monopolization case is to define the parameters of the competition faced by an alleged monopolist, the process of market definition is useful only if the market defined contains all companies and products which significantly constrain the alleged monopolist's power over price and competition. A relevant market which fails to include companies or products which exert such constraints confuses rather than advances any analysis of monopoly power. That is precisely the result of Telex's theory of market definition.

1. Telex's Relevant Market Theory Improperly Excludes Companies and Products Competing with IBM.

The "relevant market" alleged by Telex is not defined so as to include the firms which exert competitive pressure on IBM; on the contrary, most of those firms are expressly excluded from Telex's alleged "market".

Telex's market is not based upon the broad industry markets usually the subject of monopolization cases (*e.g.*, oil, steel, aluminum, tobacco, shoe machinery and flexible packaging materials). Nor is it even based upon the narrower type of market which would include a generic type of device such as a tape drive or a disk drive. Rather, it is limited to only those particular tape drives, disk drives or memories which are at any point in time actually attached to IBM equipment. Since that "market" is expressly defined in terms of equipment originally designed by IBM and thereafter copied by others, it will inevitably result in artificially inflated market shares because as "the [district] court recognized . . . every manufacturer, originally at least, has 100 per cent of its own product, including the peripherals. . . ." (A 228) Thus, Telex by its theory is able to create a "market" by the act of copying

an IBM product, which, it then argues, is "monopolized" by IBM because of IBM's high "share".

The unacceptability of petitioners' market argument is most clearly demonstrated by the fact that its logic leads inescapably to the conclusion that every EDP systems supplier has monopoly power. All systems suppliers offer CPU's with peripherals attached to them and as each new system is introduced, the supplier supplies 100% of the demand for peripherals supplied with that system. (A 21, F 37) There is absolutely no basis for differentiating IBM from any other EDP systems supplier and by virtue of Telex's unrealistic market theory, each becomes a possessor of monopoly power.

Moreover, Telex's narrow market definition does not reflect the commercial realities of the EDP industry because it artificially excludes from consideration all the competition faced by IBM before the copying of IBM equipment, which under the Telex theory, created a "market". IBM's peripherals in fact compete with the peripherals of systems suppliers, peripheral suppliers and leasing companies. (A 22, F 38)

Systems manufacturers design, develop, manufacture and market to end users complete EDP systems consisting of CPU's and peripherals. (A 24, F 40) They also sell the individual items of equipment that make up a system separately to end users. (A 27, F 45)

Peripheral suppliers manufacture and market peripheral equipment designed to compete with and supplement and displace the peripheral equipment which systems manufacturers market as part of their systems. (A 12-13, F 20; A 23, F 38) Because of the relatively low cost of interfacing peripherals to EDP systems of different manufacture, even those peripheral suppliers that do not currently supply peripherals for use with IBM systems can readily

do so and therefore exert direct competitive pressures on IBM. (A 23, F 38)

Leasing companies purchase both complete systems and individual items of equipment from manufacturers and lease both in competition with manufacturers. (A 29, F 48) Those systems may consist entirely of the equipment of one manufacturer, or the leasing company may combine equipment manufactured by several different manufacturers into a single integrated system. (A 13, F 21; A 28, F 46)

There is no satisfactory way of drawing a line between systems manufacturers, peripheral manufacturers and leasing companies. Systems manufacturers market their peripheral equipment for attachment to the CPU's of other systems manufacturers. (A 27, F 45) They both sell and lease their systems. (A 64, F 100) Peripheral manufacturers are increasingly expanding into the manufacture and marketing of complete systems. (A 27, F 45) Systems manufacturers sometimes purchase some of the equipment they include in their systems from other manufacturers. (A 8, F 11) Peripheral manufacturers often lease peripherals of other manufacturers. (A 28, F 46) Leasing companies have expanded into manufacturing some or all of the products they lease.

A systems manufacturer like IBM which designs, develops, manufactures and markets an EDP system consequently faces competition from a variety of companies and products. First, IBM's systems (including peripherals) compete with the systems (including peripherals) of other systems suppliers. Since peripherals constitute 50-75% of the value of a system and since the price and performance of peripherals is critical to the price and performance of the system as a whole, the competition between IBM peripherals marketed as part of IBM systems and peripherals of competing systems suppliers marketed as part of their systems is direct and intense. (A 22-23, F 38)

Second, IBM's peripherals compete with the peripherals manufactured and marketed by peripheral suppliers (including systems manufacturers who market peripherals separately from their systems). Peripherals offered separately from systems are offered as alternatives to, and supplements and replacements for, comparable peripherals offered by the systems manufacturer to whose CPU the peripherals are connected. Such peripherals clearly displace, and compete with, IBM's peripherals. (A 13, F 20)

Third, IBM's peripherals compete with peripherals owned by leasing companies which have purchased them from IBM and other manufacturers and which lease such peripherals in competition with IBM. (A 13, F 21)

Since peripheral equipment is threatened by the competition of equipment marketed by systems suppliers, peripheral suppliers and leasing companies, IBM's ability to set the price of that peripheral equipment must be viewed in the context of a market which includes all those competitors.

Telex's alleged market includes all the peripherals marketed by IBM as parts of its systems (each part of which is separately priced), but artificially excludes the peripherals offered by other systems manufacturers as parts of their systems. Telex also artificially excludes peripherals of non-systems suppliers if those peripherals at a given point in time are attached to non-IBM CPU's and artificially excludes all peripherals marketed by leasing companies except those attached to IBM CPU's. The inevitable result of Telex's market definition is to give IBM a very high share. When IBM first delivers a new system it has by definition 100% of the peripherals attached to it. Since much of IBM's competition comes from other systems manufacturers, even after peripheral companies begin to copy and replace particular peripheral equipment attached to IBM systems, IBM will retain a much higher share of peripherals attached to its CPU's than it has of all comparable and competitive peripherals.

2. The Court of Appeals Applied Proper Legal Standards to the Specific Facts Found by the District Court and Correctly Concluded that the District Court's Relevant Market Definition Was Improperly Narrow.

The court of appeals perceived the fallacies running through Telex's market definition and correctly held that the district court erred in limiting its definition of the relevant market so as to include only IBM peripheral equipment and peripheral equipment currently attached to IBM equipment, while excluding all other peripheral equipment. In reaching that conclusion, the circuit court simply applied the principles articulated by this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956) and other cases: ". . . the legal standard is whether the product is reasonably interchangeable". (A 233)

There can be no doubt that the court of appeals correctly articulated the applicable standard. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571 (1966). The court then proceeded to apply this standard to the facts as found by the district court. The court of appeals did not overturn any of the district court's relevant specific findings. Rather, it appraised these particular findings and correctly concluded that these specific findings clearly established that the district court had erroneously excluded from its relevant market many reasonably interchangeable products.

The specific findings of the district court establish that:

(1) peripheral suppliers supply the same type of peripheral device, such as a tape drive or disk drive, for use with both IBM and non-IBM systems (A 23, F 38 and "Listing");

(2) suppliers of EDP systems, including Control Data Corp., Burroughs Corp., Digital Equipment Corp., Honeywell Information Systems and IBM, also supply peripherals for use with systems of other manufacturers (A 22, F 38 "Listing"; A 27, F 45);

(3) the cost of developing an interface for a peripheral device is generally about the same regardless of the CPU to which it attaches and that cost is not a substantial portion of the development cost of the peripheral device (A 23, F 38);

(4) some EDP users completely perform their own systems integration work, combining equipment of different manufacture into systems suited to their own particular requirements (A 24, F 40);

(5) manufacturers of central processing units and peripherals use substantially the same technology (A 27, F 45); and

(6) suppliers of peripheral equipment are expanding into the manufacture of central processing units. (A 13, F 20; A 27, F 45)

The court of appeals correctly concluded that the district court's findings clearly established that:

> "Manufacturers of peripherals were not limited to those which were plug compatible with IBM CPUs. These manufacturers were free to adapt their products through interface changes to plug into non-IBM systems. It also followed that systems manufacturers could modify interfaces so that their own peripheral products could plug into IBM CPUs. Factually, then, there existed peripheral products of other CPU manufacturers which were competitive with IBM peripherals and unquestionably other IBM peripherals were capable of having their interfaces modified so that their peripheral products would plug into non-IBM CPU's." (A 233)

And from that conclusion correctly decided:

> "It seems clear that reasonable interchangeability is proven in the case at bar and hence the market should include not only peripheral products plug compatible with IBM CPU's, but all peripheral products, those compatible not only with IBM CPUs but those compatible with non-IBM systems. This is wholly justifiable because the record shows that these products, although not fungible, are fully interchangeable and may be interchanged with minimal financial outlay, and so cross-elasticity exists within the meaning of the *DuPont* decision". (A 237)*

As the findings of the district court make clear, it is particularly anomolous to include in the market the IBM peripherals marketed as part of complete systems while excluding the peripherals marketed as part of non-IBM systems that concededly compete with the IBM systems in the market. (A 22, F 38) A large part of the competition in the computer industry is between systems suppliers. Many IBM peripherals are marketed as parts of complete systems competing with the peripherals attached to competitive non-IBM systems. (A 24, F 40) Telex's attempt to include IBM peripherals marketed as parts of complete systems but exclude peripherals marketed as parts of competing systems is inconsistent with the district court's findings that:

(1) "[p]eripheral products constitute an important part of a data processing system, accounting for 50%-75% of the price of the system" (A 22, F 38);

(2) peripheral products "are critical to the performance of the system as a whole" (*id.*);

(3) the "quality and price/performance of the peripherals attached to a system are a substantial factor in a

*Compare *Twin City Sport Service, Inc.* v. *Charles O. Finley & Co., Inc.*, 1975 CCH Trade Cas. ¶ 60,195 (9th Cir.) where the Ninth Circuit reversed a district court's relevant market definition for failure to assess properly demonstrated "substitutability in production".

customer's choice between competing systems, and if for example IBM failed to improve the price/performance of its peripherals, customers might choose systems (including peripherals) of other systems manufacturers" (*id.*);

(4) "For example, the IBM Merlin (3330) disk drive was believed by IBM to be a critical factor to the competitive price/performance of the 370 systems 135, 145, 155, 158, 165 and 168. The 3330 was therefore announced in June of 1970 at a price/performance designed to make IBM more competitive with both systems manufacturers and peripheral equipment manufacturers" (*id.*).

Applying the proper legal standard, that of reasonable interchangeability, to the facts found by the district court, the court of appeals concluded that the district court had erred in limiting its relevant market definition so as to include all IBM peripherals and peripherals currently attached to IBM systems, while excluding all other peripheral devices, in the face of undisputed evidence that such other peripherals were reasonably interchangeable with, competed with and constrained the pricing and marketing of IBM peripherals.

As this Court has held, the scope of the relevant market is determined by application of the proper standard to "the varying circumstances of each case". *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395 (1956). The court of appeals here articulated the proper standard and correctly applied it to the particular circumstances of this case, as found by the district court.

When all computer equipment which competes with IBM is included in the market, no conclusion of monopoly power is possible because, as the district court found, IBM's share of "'electronic computers and peripheral

equipment, except parts,' . . . was 36.7 per cent". (A 39, F 61; A 224) IBM percentage shares for particular kinds of peripheral equipment as found by the district court, ranged from 30.4% to 45.6%, and are likewise inconsistent with findings of monopoly power. (*Id.*)

Although other characteristics of the EDP industry negate the existence of monopoly power independent of the market defined or the market share found in that market,* the court of appeals found it unnecessary to consider these factors because the facts that IBM's share of any properly

*The youth, growth, change and outstanding performance of the EDP industry, all found below (*supra*, pp. 11-14) are inconsistent with monopoly power which "deadens initiative, discourages thrift and depresses energy". *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (2d Cir. 1945). *Compare, e.g.*, the *Alcoa* case, where "not a pound of ingot" had been produced by anyone else in the United States from 1912 to 1934 (148 F. 2d at 430) and the production of aluminum had been practiced for 60 years (*id.* at 422): *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954), where there had been only one significant entrant into the market in 50 years (110 F. Supp. at 339), and which involved machines first manufactured before the Civil War (*id.* at 301); *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D. R. I. 1964), *aff'd*, 384 U. S. 563 (1966), where virtually all new competitors in the market over a period of 50 years had either been acquired or agreed not to compete (236 F. Supp., at 256-257) and the product market was over 60 years old (384 U. S. at 568); and *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946), where there had been no significant entrants in the preceding 8 years (328 U. S. at 794-796) and this Court expressly distinguished the tobacco industry from markets involving "new discovery or an original entry into a new field" (*id.* at 786).

Even the narrow market adopted by the district court was found by it to be young (existing only from 1969—A 21, F 37), growing (A 13, F 20; A 40, F 63; A 41, F 64), changing (A 12, F 19; A 14, F 23; A38-39, F 60), offering customers "progressively better products at progressively lower prices" (A 38-39, F 60; A 14, F 23) and characterized by the entry and growth of new competitors (A 12-13, F 19-20; A 38-39, F 60; A 40, F 63).

The extensive price and product competition found by the district court (A 38-39, F 60; A 47-48, F 72; A 54, F 85) likewise contrasts both with what one expects to find in a monopolized industry and with what has in fact been found in prior cases where industries have been held to be monopolized.

defined "market" has been steadily declining and is in the 30 to 45% range conclusively establish the absence of monopoly power within the meaning of the Sherman Act. (A 39, F 61; A 230) *See United States* v. *United States Steel Corp.*, 251 U. S. 417, 444 (1920). In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954), Judge Wyzanski held that any market share below 50 percent was insufficient to constitute monopolization :

> "The consequence is that . . . [where United has not over 50%] United has not such market power as to furnish a basis for a conclusion that it has monopolized the field." (110 F. Supp. 295, 346)

And as Judge Hand said in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir. 1945), ninety per cent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not".

3. The Court of Appeals Corrected a Novel and Dangerous Misuse of the Sherman Act.

By combining an arbitrarily narrow relevant market, defined so as to virtually guarantee high market shares, with the elimination of any meaningful standard for appraising the legality of IBM's conduct, the district court created a novel and dangerous precedent. Telex's market theory would necessarily lead to the conclusion that many, if not most, significant industrial corporations hold monopoly power over their own products which are marketed for use with some product which they sell in competition with others, because they often supply most of that related product. The district court's condemnation of IBM's introduction of the 2319, Fixed Term Plan leases and FET memory is necessarily based on a view of the Sherman Act

which condemns ordinary competitive activity. It is this combination of an artificially narrow market definition and condemnation of ordinary competition that misled the district court into awarding $259 million to Telex, despite the fact that its total reported earnings throughout its entire history from that business were less than $15 million.

This Court has written that the Sherman Act

> ". . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ." (*Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 4 (1958)).

The "interaction of competitive forces" in the EDP industry has produced impressive economic results. To apply the Sherman Act in a strained and artificial way to a relatively small fragment of the competitive forces within an industry would establish a novel and dangerous precedent which would permit the intrusion of judicial regulation into the free interplay of economic forces with serious ramifications for the remainder of the industry.

That is why it is a fundamental misuse of the Sherman Act to look at anything less than all the competition which significantly constrains a firm's behavior. That is why it is particularly wrong to focus upon the offerings of a particular supplier and exclude from consideration many competitive alternatives. When that is done, as the court of appeals appreciated, tautology is substituted for competitive analysis. As the court of appeals stated the problem:

> "The [district] court recognized that inasmuch as every manufacturer, originally at least, has 100 per cent of its own product, including the peripherals, the likelihood of finding monopolization in this area increases as the circumscribing products market is more circumscribed." (A 228)

If, for example, the Telex theory of market definition were applied to other systems suppliers, their shares of "the market", under the Telex criteria, all would begin at 100%. IBM and every other systems manufacturer would be excluded as a competitor in the market. As each systems manufacturer responded to the competition of other peripheral suppliers by lowering its own peripheral prices, it would be "monopolizing", on the district court's theory. That would be folly as a matter of common sense, economics and the Sherman Act, but that is the inevitable result of the district court's theory—unless monopolization will be found to exist only when the defendant is named IBM.

Combining such arbitrarily narrow market definitions with meaningless conduct standards raises for IBM and other successful corporations the danger of repeated judicial condemnation of desirable competitive activity in the context of narrow "markets" which exclude most of the forces imposing competitive constraints. Thus, Telex sues in its alleged "market" of peripheral devices attached to IBM equipment. Leasing companies may sue in some contrived "leasing company" market, such as that dismissed in *Greyhound Computer Corp.* v. *IBM,* 1972 CCH Trade Cas. ¶ 74,205 (D. Ariz.). Systems suppliers may sue in something they choose to call the "systems market". Each of these markets, contrived for the advantage of some particular plaintiff, excludes most, if not all, of the other competitors, notwithstanding the fact that they *all* compete with the same IBM equipment and constrain IBM's power over price and competition.

The danger is not merely that of subjecting corporations such as IBM to ruinous litigation and the courts to a flood of treble damage litigation. More important, the Telex "market" leads inevitably to the frustration of the process of competition which the Sherman Act was designed to encourage by permitting successful attacks on what is simply the offering of new products and new terms of trade

at reasonable prices expected to yield reasonable profits. Unduly narrow market definitions inevitably inhibit and eliminate competition; they are in fact the design of those seeking a shelter from legitimate competition. The court of appeals perceived and corrected the dangers of such a myopic approach to the Sherman Act. Its decision is based on recognized principles concerning market definition and competitive conduct. The results it reached are in conflict with no other decision. Its application of these principles to the facts as found by the district court is correct and raises no issue worthy of certiorari.

III

TELEX'S THEFT WAS UNLAWFUL

Telex was held to have "knowingly and deliberately misappropriated IBM trade secrets" in a "massive and pervasive program" of "invasion of IBM's trade secret and confidential information". (A 176, C 45; A 177, C 47; A 178, C 49) In addition to compensatory damages and injunctive relief, the district court also awarded punitive damages of $1,000,000 in light of the "willful, deliberate and pervasive nature of Telex's unlawful conduct". (A 187, C 60) The court of appeals held: (i) "the trial court's findings of fact are amply supported by the record"; (ii) "the trial court did not misapply the law"; (iii) the Judgment for compensatory damages should be modified from $21,900,000 to $17,500,000; and (iv) "in view of what we deem to be rather flagrant conduct on the part of Telex, the trial court exhibited considerable restraint in its award of punitive damages". (A 264)

Telex has never offered a factual defense to IBM's charges of misappropriation, tacitly admitting that it was engaged in the "massive and pervasive program" of theft

described at length by the district court.* Telex claims however, that if it should be found that IBM violated Section 2 of the Sherman Act, *i.e.,* if it should be held that the court of appeals erred on both the definition of a relevant market and the lawfulness of IBM's acts and if it should further be held that IBM had monopoly power and that Telex was injured by IBM's acts, then Telex's theft should be excused as a matter of federal law.

Telex's position is untenable. The patent misuse decisions cited by Telex have nothing whatever to do with the situation here. (See Pet., pp. 48-49) The cases relied upon by Telex are limited to invalidating patent rights which have been secured or abused in violation of Federal law. They hold only that where a federally conferred patent privilege has been secured or abused in violation of Federal law, that privilege is void and of no legal effect. They do not hold that one who has violated Section 2 of the Sherman Act is stripped of State law protection against theft. Here, the theft of which Telex was found guilty is wholly independent of the acts by which Telex claims IBM violated Section 2 of the Sherman Act. Far from being "misused", the IBM trade secrets which Telex stole were praised by the district court as embodying "significant new technology" and being of "considerable value". (A 99, F 144; A 109, F 158) The district court held that, by development of new peripheral equipment which included the trade secrets stolen by Telex, IBM was "entitled . . . legitimately, by reason of its exceptional diligence, technology and discovery to obtain legitimate competitive advantage over competitors not possessing such knowledge or information . . . ." (A 176, C 45)

Telex, in effect, argues that one found to have violated Section 2 of the Sherman Act is stripped of his State-law right to protection from theft of trade secrets. Telex could

*See the district court's extensive findings detailing Telex's scheme to build its "business" by stealing IBM trade secrets. (A 89-128, F 132-187)

as plausibly argue for its "right" to steal IBM's products from the loading dock.

As this Court stated recently, the State has an unquestionably legitimate interest in the preservation of commercial ethics which is a primary objective of the law of trade secrets, *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U. S. 470, 481-482 (1974):

> "In addition to the increased costs for protection from burglarly, wire-tapping, bribery, and the other means used to misappropriate trade secrets, there is the inevitable cost to the basic decency of society when one firm steals from another. A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable; the state interest in denying profit to such illegal ventures is unchallengeable." (*Id.* at 487, footnote omitted.)

The "willful, deliberate and pervasive nature of Telex's unlawful conduct" (A 187, C 60) has been established by the judgments of both lower courts and no error in their determinations is asserted here. There being no federal defense to theft, the judgments below present no question for review by this Court.

CONCLUSION

For the foregoing reasons, Telex's petition for a writ of certiorari should be denied.

August 28, 1975

Respectfully submitted,

THOMAS D. BARR
DAVID BOIES
PAUL M. DODYK
ROBERT F. MULLEN
One Chase Manhattan Plaza
New York, New York 10005

NICHOLAS deB. KATZENBACH
Armonk, New York
Attorneys for Respondent International Business Machines Corporation

Of Counsel

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

TRUMAN B. RUCKER
RUCKER, TABOR, McBRIDE & HOPKINS
P. O. Box 1439
Tulsa, Oklahoma 74101

ROBERT H. HARRY
DAVIS, GRAHAM & STUBBS
818 Seventeenth St.
Denver, Colorado 80202

LLOYD N. CUTLER
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

August 28, 1975